No. 10-827

In the Supreme Court of the United States

UNITED STATES OF AMERICA EX REL. SALLY CHRISTINE SUMMERS, PETITIONER

v.

LHC GROUP, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, mandates automatic dismissal of a *qui tam* suit in which the relator fails to comply with the FCA's requirement (see 31 U.S.C. 3730(b)(2)) that the complaint be filed under seal.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, imposes civil liability when a person submits a false claim in order to secure a payment from the federal government.[1] The Attorney General may bring a civil action

[1] After this lawsuit was filed, Congress twice amended the FCA. See Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21,

if he finds that a person has violated the FCA. 31 U.S.C. 3730(a). Alternatively, a private person (known as a "relator") may bring a *qui tam* action "for the person and for the United States Government." 31 U.S.C. 3730(b)(1); see, *e.g.*, *United States ex rel. Eisenstein* v. *City of New York*, 129 S. Ct. 2230, 2232 (2009). If a *qui tam* action results in the recovery of damages or civil penalties, the award is divided between the government and the relator. 31 U.S.C. 3730(d).

The FCA provides that *qui tam* complaints must be filed *in camera* and served on the government along with written disclosures of all material evidence and information the relator possesses. 31 U.S.C. 3730(b)(2). The complaint is not to be served on the defendant at the time of filing, and the case must remain under seal for at least 60 days while the government determines whether to intervene and proceed with the action. *Ibid.* Those procedural requirements are intended to provide the government with an opportunity to investigate the allegations and make an informed decision regarding whether to intervene in the action before the defendant becomes aware of the case. S. Rep. No. 345, 99th Cong., 2d Sess. 24 (1986) (*Senate Report*).

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123 Stat. 1617; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119. With certain exceptions not relevant here, these amendments "make[] no mention of retroactivity, which would be necessary for [their] application to pending cases." *Graham County Soil and Water Conservation Dist.* v. *United States*, 130 S. Ct. 1396, 1400 n.1 (2010); see *Schindler Elevator Corp* v. *United States ex rel. Kirk*, No. 10-188, slip op. 1 n.1 (May 16, 2011). In any event, the amendments do not affect the FCA provision (31 U.S.C. 3730(b)(2)) that is at issue in this case.

The defendant is not required to respond to an FCA complaint until 20 days after it is unsealed and served on the defendant. 31 U.S.C. 3730(b)(3). If the Attorney General declines to intervene in the suit, "the person bringing the action shall have the right to conduct the action." 31 U.S.C. 3730(b)(4)(B).

2. a. On March 20, 2009, petitioner Sally Christine Summers filed her *qui tam* complaint in this case. Petitioner alleged, *inter alia*, that while she was employed as a physical therapist by respondent, respondent routinely recommended, provided, and billed Medicare for health services that respondent's managers knew were unnecessary, in violation of the FCA. She also alleged that respondent had discharged her in retaliation for bringing that fraudulent conduct to respondent's attention. In accordance with Section 3730(b)(2), petitioner served the complaint on the United States and not on the defendant. Petitioner failed, however, to comply with Section 3730(b)(2)'s additional requirement that the complaint be filed *in camera* and remain under seal. Pet. App. 34a-35a & n.2.

According to an affidavit that was subsequently filed by petitioner's attorney, an employee of the district court clerk's office contacted the attorney shortly after the *qui tam* complaint was filed to inquire whether the complaint should be placed under seal. The employee allegedly told petitioner's counsel that the complaint "would not be logged into the [Electronic Case Filing] system until [counsel] and the Clerk's Office had discussed the proper filing method." Pet. App. 4a (quoting Pet. C.A. Br. 6). On March 23, 2009, the clerk's office employee left the attorney a voicemail stating that, in order to file the complaint under seal, counsel needed to

send the clerk an e-mail making that request. When petitioner's counsel subsequently called the clerk's office to confirm the relevant e-mail address, he was told by another employee that he would need to file a motion to seal the case rather than send an e-mail. *Id.* at 3a-4a, 34a-35a.

The next day, before petitioner's lawyer had filed any motion, the district court posted the complaint online via PACER, a publicly accessible internet portal for court filings. On March 26, 2009, an Assistant United States Attorney called petitioner's counsel to notify him that the United States Attorney's Office had seen the case on PACER. On March 27, 2009, petitioner's counsel filed a motion to seal the case, but the motion was denied three days later on the ground that it failed to explain why the case should be sealed. Pet. App. 4a, 35a-36a.

b. The district court granted respondent's motion to dismiss the complaint with prejudice for failure to comply with Section 3730(b)(2)'s filing-under-seal requirement. Pet. App. 32a-51a. Petitioner relied on *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 67 F.3d 242 (1995), cert. denied, 534 U.S. 1040 (2001), in which the Ninth Circuit applied a balancing test to determine the appropriate sanction for non-compliance with Section 3730(b)(2)'s seal requirement. The district court in this case declined to follow that approach. Describing *Lujan* as involving a post-filing violation of the seal requirement, the court found the balancing test "inappropriate in the present context, particularly given that the requisite seal was never in place." Pet. App. 40a-41a. Although the district court did not decide whether Section 3730(b)(2)'s requirements are jurisdictional (*id.* at 45a), it held that petitioner's failure to file the complaint un-

der seal "is a fatal deficiency that requires dismissal of this action with prejudice as to the relator (without prejudice to the United States), both because her failure to comply with the statute deprives her of the ability to pursue the remedy created by the statute, and because the same failure incurably frustrates the underlying purposes of the procedural requirements" (*id.* at 47a).

3. The court of appeals affirmed. Pet. App. 1a-31a.[2]

The court of appeals recognized that "the primary purpose of the under-seal requirement is to permit the Government sufficient time in which it may ascertain the status quo and come to a decision as to whether it will intervene in the case filed by the relator." Pet. App. 10a, 12a n.4; see *id.* at 29a-31a (Keith, J., concurring in the result). The court of appeals also rejected respondent's (and the district court's) effort to distinguish the Ninth Circuit's decision in *Lujan*. *Id.* at 15a-17a. The court explained that, under the Ninth Circuit's reasoning in *Lujan*, the balancing test would apply "regardless of whether the alleged breach occurred after filing or due to a failure to file *in camera* altogether." *Id.* at 17a.

The court of appeals nevertheless declined to follow *Lujan*, holding instead that dismissal of the complaint is the only appropriate sanction for "violations of the procedural requirements imposed on *qui tam* plaintiffs under the False Claims Act." Pet. App. 18a. The court explained that, in fashioning the seal requirement, "Congress clearly identified the factors it found relevant and considered the tension between them, and decided that a sixty-day *in camera* period was the correct length

[2] The court of appeals did not disturb the district court's conclusion that the dismissal was without prejudice to the United States. Pet. App. 24a. That issue is not in dispute before this Court.

of time required to balance those factors." *Id.* at 19a. The court acknowledged that in some cases, "a disclosure might turn out to be relatively benign." *Id.* at 22a. The court concluded, however, that "[r]equiring violations of the FCA's under-seal requirement to be subjected to a balancing test * * * both misses the point of the requirement itself and potentially encourages plaintiffs to comply with the FCA's underseal requirement only to the point the costs of compliance are outweighed by the risk that any given violation would turn out to be severe enough to require dismissal." *Id.* at 22a-23a.

Judge Keith concurred in the result. Pet. App. 26a-31a. Although Judge Keith agreed with the majority's reading of the FCA, see *id.* at 29a, he acknowledged that the Ninth Circuit in *Lujan* and the Second Circuit in *United States ex rel. Pilon* v. *Martin Marietta Corp.*, 60 F.3d 995 (1995), "have adopted an approach that determines whether to dismiss an improperly filed complaint on a case by case basis, as opposed to the *per se* rule adopted here." Pet. App. 26a. Judge Keith further explained that Congress had imposed the sealing requirement to protect the government's ability to investigate the relator's allegations, not "to safeguard the defendant's interest in not being improperly defamed." *Id.* at 29a; see *id.* at 29a-31a.

DISCUSSION

The court of appeals held that dismissal of a relator's *qui tam* complaint is the mandatory sanction for noncompliance with 31 U.S.C. 3730(b)(2)'s requirement that the complaint be filed under seal. Section 3730(b)(2)'s text and purpose do not support that rule. The Sixth

Circuit's inflexible approach is also inconsistent with the background understanding that courts ordinarily possess broad discretion to determine the appropriate sanction for violations of similar procedural requirements. The decision below also conflicts with the Ninth Circuit's decision in *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 67 F.3d 242 (1995), cert. denied, 534 U.S. 1040 (2001), and it is in tension with the Second Circuit's decision in *United States ex rel. Pilon* v. *Martin Marietta Corp.*, 60 F.3d 995 (1995).

For all of those reasons, the question presented warrants resolution by this Court. The present case does not provide a suitable vehicle, however, because petitioner's suit (at least in substantial part) appears to be subject to dismissal for lack of jurisdiction under a different provision of the FCA, the first-to-file bar of 31 U.S.C. 3730(b)(5). The petition for a writ of certiorari therefore should be denied.

A. The Court Of Appeals Erred In Creating A Per Se Rule Mandating Dismissal Of A *Qui Tam* Suit Where The Relator Fails To Comply With Section 3730(b)(2)'s Seal Requirement

1. Where, as here, a statute establishes a procedural rule without specifying the consequences of a violation, this Court looks "to statutory language, to the relevant context, and to what they reveal about the purposes that [the requirement at issue] is designed to serve." *Dolan* v. *United States*, 130 S. Ct. 2533, 2538 (2010). Those sources do not support the court of appeals' holding that the FCA requires automatic dismissal of a *qui tam* complaint when a relator violates Section 3730(b)(2)'s seal requirement. Rather, as is typically the case when seal-

ing requirements are violated, the district court possesses broad discretion to choose an appropriate sanction.

a. In its entirety, Section 3730(b)(2) states:

> A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

31 U.S.C. 3730(b)(2).

As a general rule, "when Congress does not rank a statutory limitation * * * as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 516 (2006). Neither Section 3730(b)(2) nor any other provision in the FCA indicates that the specified requirements are jurisdictional, and compliance with applicable sealing requirements is not typically treated as a prerequisite to the court's exercise of jurisdiction. See pp. 12-13, *infra*. None of the courts of appeals that have addressed the question presented—including the Sixth Circuit below—has held that a relator's failure to comply with Section 3730(b)(2) deprives the district court of jurisdiction over the complaint. To the contrary, both the Sixth Circuit (Pet. App. 6a n.2) and the Second Circuit (*Pilon*, 60 F.3d at 999-1000 nn.4-5) have expressed skepticism

about the contention that the seal requirement is jurisdictional, and the Ninth Circuit (*Lujan*, 67 F.3d at 245) has squarely rejected that contention.

In addition, neither Section 3730(b)(2) nor any other provision in the FCA states that a *qui tam* complaint must be dismissed if the relator fails to comply with Section 3730(b)(2)'s seal requirement. Indeed, the FCA says nothing at all about the appropriate sanction for such a breach. In *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989), this Court held that the plaintiff's failure to comply with the Resource Conservation and Recovery Act's 60-day notice requirement mandated dismissal of the suit because the Act provided that "[n]o action may be commenced" unless that requirement was satisfied. *Id* at 25-26 (quoting 42 U.S.C. 6972(b)(1) (1982)). Section 3730(b)(2) contains no comparable language, but simply states in relevant part that the complaint "shall be filed in camera" and "shall remain under seal for at least 60 days." 31 U.S.C. 3730(b)(2); cf. *Scarborough* v. *Principi*, 541 U.S. 401, 405-406 (2004) (holding that dismissal was not required despite plaintiff's initial failure to comply with the Equal Access to Justice Act's instruction that an applicant for attorney fees "shall also allege that the position of the United States was not substantially justified").

b. The court of appeals concluded that a rule of automatic dismissal would further the purposes that Congress sought to protect by enacting the seal requirement. See Pet. App. 19a-23a. That analysis was misconceived. Although dismissal will sometimes be the appropriate sanction for a relator's failure to file his FCA complaint under seal, the rigid rule announced by the

court of appeals would disserve the purposes of the FCA and the interests of the United States.

The FCA was enacted in 1863 to prevent and deter fraud arising out of Civil War defense contracts. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696; see *United States* v. *McNinch*, 356 U.S. 595, 599 (1958) ("Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury."). In order to ensure enforcement of the FCA despite limited governmental resources, Congress included *qui tam* provisions permitting private individuals (*i e.*, relators) to bring suit on behalf of the United States. See *United States ex rel Marcus* v. *Hess*, 317 U.S. 537, 540 (1943). Because relators who bring successful suits receive a portion of the proceeds, the *qui tam* provisions create an incentive for private citizens to uncover and prosecute fraud against the federal government. See, *e.g.*, *ACLU* v. *Holder*, No. 09-2086, 2011 WL 1108252, at *2 (4th Cir. Mar. 28, 2011) (observing that the *qui tam* provisions "let loose a posse of ad hoc deputies to * * * supplement the government's regular troops") (internal quotation omitted).

In 1986, as part of a comprehensive revision of the FCA, Congress amended the Act's *qui tam* provisions with the "overall intent" of "encourag[ing] more private enforcement suits." *Senate Report* 23-24. Congress recognized, however, that a proliferation of *qui tam* suits could potentially hinder the government's own investigative and enforcement efforts. The Senate Report explained:

> The Justice Department raised a concern * * * that a greater number of private suits could increase the chances that false claims allegations in civil suits might overlap with allegations already under criminal investigation. The Justice Department asserted that the public filing of overlapping false claims allegations could potentially "tip off" investigation targets when the criminal inquiry is at a sensitive stage. While the Committee does not expect that disclosures from private false claims suits would often interfere with sensitive investigations, we recognize the necessity for some coordination of disclosures in civil proceedings in order to protect the Government's interest in criminal matters.

Ibid. In response to that concern, Congress enacted Section 3730(b)(2) (including the seal requirement) "to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action." *Ibid.*[3]

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[3] Neither the statutory text nor the legislative history suggests that Congress also intended the seal requirement to protect the rights of defendants. To the contrary, the Senate Report stated that "[b]y providing for sealed complaints, the Committee does not intend to affect defendants' rights in any way." *Senate Report* 24; see *Lujan*, 67 F.3d at 247 (observing that "protecting the rights of defendants is not an appropriate consideration when evaluating the appropriate sanction for a violation of the seal provision"); Pet. App. 12a n 4 ("[W]e have found no support in the legislative history * * * for the proposition that [protecting defendants' rights] was one of the purposes of the

The Sixth Circuit's mandatory dismissal rule does not comport with Congress's intent that Section 3730(b)(2) support the government's investigative and enforcement efforts. If the government does not believe it has been prejudiced by a particular violation of the seal requirement and desires the *qui tam* litigation to proceed, the decision below would disserve the weighty interests protected by the statute and grant a windfall to the defendant by mandating dismissal of the complaint. Accordingly, the Sixth Circuit's blunt, mandatory dismissal rule is not appropriately tailored to the statutory purposes behind the FCA.

2. a. The Sixth Circuit was likewise wrong in characterizing "a *Lujan*-style balancing test" as "a form of judicial overreach." Pet. App. 18a. If Congress had directed courts to dismiss *qui tam* complaints that are not filed under seal, it would indeed be inappropriate for courts to fashion their own exceptions to that mandate. But in the absence of specific statutory direction, courts ordinarily have significant discretion to determine whether dismissal is the appropriate sanction for noncompliance with a procedural rule or statutory requirement. See, *e.g.*, *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43-45 (1991) (recognizing a district court's "discretion * * * to fashion an appropriate sanction for conduct which abuses the judicial process," including but not limited to "outright dismissal of a lawsuit").

With respect to violations of seal requirements in particular, trial courts regularly and appropriately impose sanctions other than dismissal of a complaint. See,

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under-seal requirement.") (emphasis omitted); *id.* at 29a-31a (Keith, J., concurring in the result).

e.g., *Greiner* v. *City of Champlin*, 152 F.3d 787, 789-790 (8th Cir. 1998) (upholding award of monetary sanctions against plaintiff's attorney for violating seal); *Grove Fresh Distrib., Inc.* v. *John Labatt, Ltd*, 134 F.3d 374 (7th Cir.) (affirming district court's imposition of monetary contempt sanctions against plaintiff's counsel for violating seal) (table), cert. denied, 525 U.S. 877 (1998); *Coleman* v. *American Red Cross*, 23 F.3d 1091, 1094-1096 (6th Cir. 1994) (holding that although plaintiff's attorney intentionally violated protective order, dismissal was too harsh a sanction absent evidence of prejudice). Dismissal is ordinarily reserved for egregious or bad-faith violations. See, *e.g.*, *Toon* v. *Wackenhut Corr. Corp.*, 250 F.3d 950, 952-953 (5th Cir. 2001) (dismissal is appropriate sanction for seal violation only if plaintiff acted in "bad faith"); *Marrocco* v. *General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992) (dismissal of suit appropriate because plaintiff's violation of protective order constituted "contumacious conduct"); see also *Cohen* v. *Longshore*, 621 F.3d 1311, 1314 (10th Cir. 2010) ("Although a district court has the discretion to dismiss a case with prejudice for the failure to comply with the rules of civil procedure or the court's orders, the court does not exercise its discretion soundly unless it first considers certain criteria—specifically, (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.") (internal quotation and citation omitted).

In light of that background understanding, Congress's silence as to the sanction for a violation of Section 3730(b)(2) does not imply a per se rule of dismissal.

b. The Sixth Circuit also suggested that a balancing approach might "encourage[] plaintiffs to comply with the FCA's underseal requirement only to the point the costs of compliance are outweighed by the risk that any given violation would turn out to be severe enough to require dismissal." Pet. App. 22a-23a. The court believed that under such a regime, "the extent of a plaintiff's compliance with the FCA's under-seal requirement would become subject to the same risk analysis as any other litigation tactic, an analysis in which it would be the plaintiff's, not the Government's, interests that were paramount." *Id.* at 23a. But if a particular violation of Section 3730(b)(2)'s seal requirement appears to follow from the sort of calculation the court hypothesized, the willful nature of the violation will weigh in favor of dismissal. See *Lujan*, 67 F.3d at 246. In addition, the government can and does provide courts with information to help determine whether the government's investigatory and enforcement efforts have been compromised by a particular breach of Section 3730(b)(2).

If the government informs the court that its interests have not been prejudiced by the violation and that it desires the litigation to proceed, the court should give that assessment due weight. The Sixth Circuit's approach, by contrast, requires dismissal even in cases where the violation is inadvertent and the government believes that continued prosecution of the *qui tam* suit would further its own enforcement interests. And in any event, the possibility of strategically-motivated violations does not distinguish Section 3730(b)(2) from other

sealing requirements or procedural rules, as to which district courts typically exercise broad remedial discretion.

B. The Courts Of Appeals Are Divided On The Question Presented

1. As the Sixth Circuit acknowledged, its ruling in this case conflicts with the Ninth Circuit's decision in *Lujan*. Pet. App. 15a-18a; see *id.* at 26a-29a (Keith, J., concurring in the result). The Ninth Circuit held that a relator's failure to comply with Section 3730(b)(2)'s seal requirement "does not per se require dismissal of the *qui tam* complaint." *Lujan*, 67 F.3d at 245. The Ninth Circuit instead identified three factors—(1) the extent to which the government was harmed by the violation; (2) the "relative severity" of the violation; and (3) whether the violation was willful or in bad faith—that the district court should consider in determining whether dismissal is an appropriate sanction for a breach of Section 3730(b)(2)'s sealing requirement. *Id.* at 245-246. The court below expressly rejected the Ninth Circuit's balancing test, holding instead that a *qui tam* plaintiff's failure to comply with Section 3730(b)(2) mandates automatic dismissal of the suit. Pet. App. 18a ("[H]aving the issue squarely before us, we decline to follow the *Lujan* court's analysis, and hold that violations of the procedural requirements imposed on *qui tam* plaintiffs under the False Claims Act preclude such plaintiffs from asserting *qui tam* status.").

Respondent seeks (Br. in Opp. 2-4) to distinguish the two decisions on the ground that *Lujan* involved a *post*-filing violation of Section 3730(b)(2), whereas petitioner's violation involved the filing of the complaint. But

while the *Lujan* relator's most serious violation of the seal requirement occurred when she described her complaint to a *Los Angeles Times* reporter after it had been filed under seal, see 67 F.3d at 244, the relator also violated the seal requirement before filing by disclosing to the defendant in that case her intent to pursue the *qui tam* action and the nature of her allegations, see *id.* at 245-246. In any event, the Ninth Circuit's rejection of a per se dismissal rule, and its adoption of a balancing test, did not depend on the timing of the seal violation. The court squarely held that "[t]he requirements of 3730(b)(2) are not jurisdictional, and violation of those requirements does not per se require dismissal of the *qui tam* complaint." *Id.* at 245. Indeed, the Ninth Circuit discussed the timing and extent of the violation only in the latter portion of the opinion when it applied the second factor of its balancing test, *i.e.*, the nature and severity of the violation. See *id.* at 246. Accordingly, as the Sixth Circuit acknowledged (Pet. App. 17a), *Lujan*'s balancing approach applies "regardless of whether the alleged breach occurred after filing or due to a failure to file in camera altogether, and to skirt the logic of *Lujan* by making that distinction would miss its import."

2. As Judge Keith noted (Pet. App. 28a-29a), the Sixth Circuit's decision is also in tension with the analysis of the Second Circuit in *Pilon*. The relators in *Pilon* failed to comply with Section 3730(b)(2)'s initial filing and service requirements, and then gave an interview about their *qui tam* complaint to a local newspaper. 60 F.3d at 997-998. Although the Second Circuit ultimately held that dismissal of the complaint was appropriate in that case because the relators' "failure to comply with the service and filing requirements incurably frus-

trated" Congress's purposes in enacting Section 3730(b)(2), the Second Circuit did not adopt a per se rule of dismissal. *Id.* at 998-999. Rather, in an analysis closely resembling *Lujan*'s balancing inquiry, the Second Circuit concluded that dismissal was warranted under the facts of the case because the government had been harmed by the relators' non-compliance, *id.* at 999, because the violations were "particularly egregious," *id.* at 998, and because the record revealed "a considerable lack of good faith" by relators' counsel, *id.* at 999. Indeed, the Ninth Circuit in *Lujan* relied in part on *Pilon* in formulating and applying its three-factor balancing test. See *Lujan*, 67 F.3d at 245-247.

3. In addition to the decisions of the Second, Sixth, and Ninth Circuits, more than 20 district courts have addressed in written decisions the appropriate sanction for a violation of Section 3730(b)(2)'s seal requirement. Most though not all of those district courts have agreed with the Second and Ninth Circuits that violations of Section 3730(b)(2) do not automatically require dismissal of the complaint.[4]

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[4] See Pet. App. 26a-28a (collecting cases). Compare *United States ex rel Stewart* v. *Altech Servs., Inc.*, No. 07-0213, 2010 WL 4806829 (E.D. Wash. Nov. 18, 2010); *United States ex rel. Branch Consultants, L.L.C.* v. *Allstate Ins. Co.*, 668 F. Supp. 2d 780, 803 (E.D. La. 2009); *United States ex rel. Ubl* v. *IIF Data Solutions*, No. 1:06-cv-641, 2009 WL 1254704, at *2-*3 (E.D. Va. May 6, 2009); *United States ex rel. Le Blanc* v. *ITT Indus., Inc.*, 492 F. Supp. 2d 303, 307-308 (S.D.N.Y. 2007); *In re Natural Gas Royalties Qui Tam Litig.*, 467 F. Supp. 2d 1117, 1227-1228 (D. Wyo. 2006); *United States ex rel. King* v. *F.E. Moran, Inc.*, No. 00 C 3877, 2002 WL 2003219, at *13 (N.D. Ill. Aug. 29, 2002), *Burns* v. *Lavender Hill Herb Farm, Inc.*, No. 01-CV-7019, 2002 WL 31513418 (E.D. Pa. Oct. 30, 2002); *United States ex rel. Downy* v. *Corning, Inc.*, 118 F. Supp. 2d 1160, 1163-1164 (D.N.M. 2000);

C. Petitioner's Suit Is Subject To Dismissal On An Alternative Jurisdictional Ground

For the foregoing reasons, the Sixth Circuit erred in treating dismissal as the mandatory sanction for violation of Section 3730(b)(2)'s sealing requirement, and the question presented would warrant this Court's review in an appropriate case. This case, however, is an unsuitable vehicle for resolution of that question because the relator's complaint (at least in substantial part) is subject to dismissal on an alternative jurisdictional ground.

In 2007, a different relator filed an FCA complaint against respondent (among other defendants), making allegations of Medicare fraud similar to those made in this suit. See First Am. Compl., *United States ex rel. Judy Master* v. *LHC Group, Inc., et al.*, No. 07-1117

Castenson v. *City of Harcourt*, 86 F. Supp. 2d 866, 877-78 (N.D. Iowa 2000); *Wisz ex rel. United States* v. *C/HCA Dev., Inc.*, 31 F. Supp. 2d 1068, 1069 (N.D. Ill. 1998); *United States* v. *Fiske*, 968 F. Supp. 1347, 1350-1351 (E.D. Ark. 1997); *United States ex rel. Mikes* v. *Straus*, 931 F. Supp. 248, 259-260 (S.D.N.Y. 1996), *United States ex rel. Kusner* v. *Osteopathic Med. Ctr. of Phila.*, No. 88-9753, 1996 WL 287259, at *5 (E.D. Pa. May 30, 1996); *United States ex rel. Windsor* v. *DynCorp, Inc.*, 895 F. Supp. 844, 848 (E.D. Va. 1995); *United States ex rel. Stinson, Lyons, Gerlin & Bustamonte, P.A.* v. *Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040, 1053-1054 (S.D. Ga. 1990) with *Tautz* v. *Obama*, 707 F. Supp. 2d 1, 4 (D.D.C. 2010), *United States ex rel. Maully* v. *Healthsouth Holdings, Inc.*, Nos. 07-2981, 09-483, 2010 WL 149830, *3 (D.N.J. Jan. 15, 2010), *United States ex rel. Fellhoelter* v. *Valley Milk Prod., L.L.C.*, 617 F. Supp. 2d 723, 727-728 (E.D. Tenn. 2008); *Anderson* v. *ITT Indus. Corp.*, No. 1:05-CV-720, 2006 WL 4117030 (E.D. Va. Jan. 11, 2006), *Friedman* v. *F.D.I.C.*, Nos. 93-277, 93-415, 1995 WL 608462, at *3 (E.D. La. Oct. 16, 1995); *Erickson ex rel. United States* v. *American Inst. of Biological Sci.*, 716 F. Supp. 908, 910 (E.D. Va. 1989).

(sealed) (W.D. La. Nov. 29, 2007).[5] The FCA provides that "[w]hen a person brings [a *qui tam* action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. 3730(b)(5). Based on its comparison of the complaints filed in the two cases, the government believes that Section 3730(b)(5) likely establishes an independent bar to petitioner's fraud claims.[6]

Although Section 3730(b)(5) is a jurisdictional limit on *qui tam* suits, see, *e.g.*, *Grynberg ex rel. United States* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004), this Court would have discretion to address the question presented in the certiorari petition without determining whether the first-to-file bar applies, since the question whether violation of Section 3730(b)(2)'s sealing requirement compels dismissal is itself a threshold (albeit non-jurisdictional) issue unrelated to the merits of petitioner's allegations. See *Sinochem Int'l Co* v. *Malaysia Int'l Shipping Corp*, 549 U.S. 422, 430-432 (2007) (holding that a court may dismiss a case on *forum non conveniens* grounds without determining its own jurisdiction). And because no proceedings in this case are pending in the courts below in light of the court of appeals' decision affirming the district court's dismissal, the lower courts will not actually apply the first-to-file bar to petitioner's complaint

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[5] On May 24, 2011, the district court in *United States ex rel Master* granted the government's motion to partially lift the seal in that case so that the government could inform petitioner and this Court of its existence and its relationship to petitioner's FCA suit.

[6] Petitioner's complaint also raises a retaliation claim under 31 U.S.C. 3730(h). Substituted Am. Compl., No. 3 09-0277 (M.D. Tenn. Apr. 23, 2009), at ¶ 5, p. 5. That claim is not subject to Section 3730(b)(5).

while the case is pending before this Court. Nevertheless, in light of the earlier-filed complaint in *United States ex rel. Master*, this Court's resolution of the question presented would not ultimately affect the appropriate disposition of the fraud claims in this case. This case therefore is not an appropriate vehicle for resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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